Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
	)	
Hyperion Telecommunications, Inc.	)	CCB/CPD No. 96-3
Petition Requesting Forbearance	)	
	)	
Time Warner Communications	)	CCB/CPD No. 96-7
Petition for Forbearance	)	
	)	
Complete Detariffing for	)	
Competitive Access Providers and	)	CC Docket No. 97-146
Competitive Local Exchange Carriers	)	

MEMORANDUM OPINION AND ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: June 19, 1997 **Released: June 19, 1997**

By the Commission:

I. INTRODUCTION

1. On March 21, 1996, Hyperion Telecommunications, Inc. (Hyperion) filed a petition requesting that the Commission forbear from imposing tariff filing requirements for competitive access providers (CAPs). On May 2, 1996, Time Warner Communications filed a similar petition seeking forbearance from imposition of "tariff filing requirements on non-dominant telecommunications carriers in general, and on non-dominant providers of interstate access services in particular."[1] For the reasons set forth below, we grant these petitions insofar as they seek permissive detariffing for provision of interstate exchange access services by providers other than the incumbent local exchange carrier (ILEC). This action will further the goal of the 1996 Act of establishing "a pro-competitive, de-regulatory national policy framework" that will "promote competition and reduce regulation . . . to secure lower prices

[1] Time Warner Petition at 1.

and higher quality service for American telecommunication consumers and encourage the rapid development of new telecommunications technologies."[2] We deny Time Warner's petition to the extent it requests forbearance from tariffing services other than interstate exchange access. In the Notice of Proposed Rulemaking, we propose to forbear further and establish complete detariffing for all non-ILEC providers of interstate exchange access services.

II. BACKGROUND

2. In the Competitive Carrier proceeding, the Commission, in a series of orders beginning in 1980, pursued pro-competitive and deregulatory goals similar to those underlying the 1996 Act.[3] The Commission established a permissive detariffing policy for nondominant carriers, pursuant to which such carriers were permitted, although not required, to file tariffs with the Commission.[4] The Commission concluded that market forces, together with the Section 208 complaint process and the Commission's ability to reimpose tariff-filing and facilities-authorization requirements, were sufficient to protect the public interest with respect to nondominant interexchange carriers subject to forbearance.[5]

3. In 1985, the Commission established complete detariffing for all carriers subject to forbearance.[6] That order subsequently was vacated and remanded by the U.S. Court

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[2] Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement).

[3] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979) (Competitive Carrier NPRM); First Report and Order, 85 FCC 2d 1 (1980) (First Report and Order); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (Competitive Carrier Further NPRM); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982) (Second Report and Order); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (Fourth Report and Order), vacated AT&T Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1992), cert. denied, MCI Telecommunications Corp. v. AT&T Co., 509 U.S. 913 (1993); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (Fifth Report and Order); Sixth Report and Order, 99 FCC 2d 1020 (1985) (Sixth Report and Order), vacated MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (collectively referred to as the Competitive Carrier proceeding).

[4] See Second Report and Order, 91 FCC 2d 59 (applying permissive detariffing to resellers of terrestrial common carrier services); Fourth Report and Order, 95 FCC 2d 554 (applying permissive detariffing to all other resellers and specialized common carriers, including MCI and GTE Sprint); Fifth Report and Order, 98 FCC 2d 1191 (applying permissive detariffing to domestic satellite carriers, miscellaneous common carriers, carriers providing domestic, interstate and interexchange digital transmission services, and certain affiliates of exchange carriers offering interstate, interexchange services).

[5] Fourth Report and Order at 579.

[6] Sixth Report and Order at 1029. The Commission stated: "Throughout this rulemaking, we have determined that enforcement of Sections 201 and 202 objectives of just and reasonable rates could be effectuated for certain carriers without the filing of tariffs and through market forces and the administration of the complaint

of Appeals for the D.C. Circuit,[7] on the ground that the Commission lacked the statutory authority to prohibit carriers from filing tariffs.[8] The court, however, did not reach the issue of whether the Commission's earlier permissive detariffing orders were valid.[9] The Commission continued to apply permissive detariffing.

4. In a subsequent proceeding initiated in response to an AT&T complaint, the Commission again determined that permissive detariffing was within its authority under the Communications Act.[10] The U.S. Court of Appeals for the D.C. Circuit granted summary reversal of that decision based on the court's earlier AT&T v. FCC decision.[11] While stating that it did "not quarrel with the Commission's policy objectives," the court found that the Communications Act as it existed at that time did not give the Commission authority to adopt such a policy.[12] In affirming the U.S. Court of Appeal's ruling, the Supreme Court found that section 203(b)(2) of the Communications Act gives the Commission authority to modify the Communications Act's tariff filing requirement, but not to eliminate it entirely.[13] In the Nondominant Carrier Filing Order, the Commission modified the tariff filing requirements and established a one-day tariff notice period for all nondominant carriers after again concluding that traditional tariff regulation of nondominant carriers is not necessary to ensure just and reasonable rates.[14] In that order, the Commission concluded that "CAPs are nondominant

process." Id. at n.33.

[7] MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[8] Id. at 1192.

[9] Id. at 1196.

[10] See Tariff Filing Requirements for Interstate Common Carriers, CC Docket No. 92-13, Report and Order, 7 FCC Rcd 8072 (1992). While adopted prior to the court's finding that the Commission's permissive detariffing policy exceeded the Commission's statutory authority, the order was released after the court vacated the Fourth Report and Order.

[11] AT&T Co. v. FCC, Nos. 92-1628, 92-1666, 1993 WL 260778 (D.C. Cir. June 4, 1993) (per curiam), aff'd, MCI Telecommunications Corp. v. AT&T Co., 114 S. Ct. 2223 (1994).

[12] Id. at 736.

[13] MCI Telecommunications Corp. v. AT&T Co., 114 S. Ct. 2223, 2229-31 (1994).

[14] Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6756-57 (1993) (Nondominant Carrier Filing Order), vacated on other grounds, Southwestern Bell Corp. v. FCC, 43 F.3d 1515 (D.C. Cir. 1995) (finding the range of rates provision in the Nondominant Carrier Filing Order violated Section 203(a) of the Communications Act). The Commission subsequently eliminated the range of rates provision and reinstated the other tariff filing requirements, including the one-day notice period, adopted in the Nondominant Filing Order. Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Order, 10 FCC Rcd 13653 (1995) (Nondominant Carrier Filing Order II).

carriers because they have not been previously declared dominant."[15] The Commission also explained that "because by definition nondominant carriers cannot exercise market power, unlawful tariffs should be rare, and in those few instances in which they may occur, remedial action can be taken after the tariffs become effective."[16]

5. The Telecommunications Act of 1996 added Section 10 to the Communications Act of 1934, as amended. Section 10 requires the Commission to forbear from applying any regulation or any provision of the Communications Act, to telecommunications carriers or telecommunications services, or classes thereof, if the Commission determines that certain conditions are satisfied.[17] Section 10 provides that:

> [T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that --
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> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;
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> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
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> (3) forbearance from applying such provision or regulation is consistent with the public interest.[18]

In making the public interest determination, Section 10 requires the Commission to consider whether forbearance will promote competitive market conditions, including the extent to

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[15] Id. at para. 13.

[16] Id. at para. 23.

[17] 47 U.S.C. § 160.

[18] Id.

which forbearance will enhance competition among providers of telecommunications services.[19]

6. In the IXC Forbearance Order, we adopted complete, i.e., mandatory, detariffing for IXCs (not permitting carriers to file tariffs).[20] In doing so, we determined that requiring nondominant interexchange carriers to file tariffs for interstate, domestic, interexchange services impeded vigorous competition, and identified public interest benefits that would result from complete detariffing of such services. We declined to adopt permissive detariffing because we determined that permissive detariffing of such services would undermine several of the benefits of complete detariffing, and therefore, we concluded that, relative to complete detariffing, permitting carriers to file on a voluntary basis would not be in the public interest.[21]

7. In the IXC Forbearance Order, the Commission concluded that it was "highly unlikely" that carriers lacking market power could successfully charge rates that violate the Communications Act because an attempt to do so would prompt their customers to switch to different carriers.[22] Moreover, the Commission concluded that it could address illegal carrier conduct through the Section 208 complaint process.[23] With respect to the second statutory criterion requiring us to conclude that tariff filing for interstate exchange access services is not necessary to protect consumers, we found that, with respect to complete detariffing, "market forces, our administration of the Section 208 complaint process, and our ability to reimpose tariff filing requirements, if necessary, are sufficient to protect customers."[24] Moreover, we determined that mandatory tariffing harmed consumers by impeding vigorous competition.[25] We also noted that the third statutory forbearance criterion requires an analysis of whether the proposed forbearance (i.e., permissive or complete) is consistent with the public interest.[26] We also determined that the Commission had authority under Section 10 to establish complete

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[19] 47 U.S.C. § 160(b). New Section 10(b) also provides that, "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest." Id.

[20] Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996) (IXC Forbearance Order).

[21] IXC Forbearance Order, para. 52.

[22] Id. at para. 21.

[23] Id.

[24] Id. at para. 36.

[25] Id. at para. 37.

[26] Id. at para. 15.

detariffing. We stated that it seems inconceivable that Congress intended Section 10 to be interpreted in a manner that allowed continued compliance with provisions or regulations that the Commission has determined were no longer necessary in certain contexts.

8. Neither the IXC Forbearance NPRM[27] nor the IXC Forbearance Order addressed the issue of forbearance from tariff filing requirements for non-ILEC providers of interstate exchange access services. Since reversal of our permissive detariffing policy by the Supreme Court, these carriers have been required to file tariffs for interstate exchange access services.[28]

9. In the Access Reform Order, the Commission, *inter alia*, considered whether to adopt any regulations governing the provision of terminating access provided by CLECs.[29] The Commission determined that no regulation of their provision of interstate access was necessary because these carriers do not appear to possess market power, and concluded that reliance on the complaint process will be sufficient to assure that non-ILEC rates are reasonable.[30] The Commission stated that it would be sensitive to indications that the terminating access rates of CLECs are unreasonable, and would revisit the issue if necessary.[31]

III. PETITIONS AND COMMENTS

A. Petitions.

10. Hyperion and Time Warner contend that their petitions meet the statutory criteria for forbearance under Section 10 to establish permissive detariffing for non-ILEC providers of interstate exchange access services.[32] Quoting the Commission's Second Report

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[27] Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-61, Notice of Proposed Rulemaking, 11 FCC Rcd 7141 (1996) (IXC Forbearance NPRM).

[28] See 47 C.F.R. § 61.23(c).

[29] See In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges, CC Docket No. 96-262, First Report and Order, FCC 97-158, (rel. May 16, 1997) (Access Reform Order), Sec. VI., C.

[30] Id. at ¶ 363.

[31] Id. at ¶ 364.

[32] Although Hyperion requests permissive detariffing in its petition, Time Warner did not specify permissive detariffing until its Reply Comments. Time Warner Reply Comments at 1. Time Warner states in its petition that it seeks forbearance from tariff filing requirements on "non-dominant carriers whose interstate services are not within the scope of the [Commission's] detariffing proposal in Docket No. 96-61." Time Warner Petition at 1, n.1. The Commission sought and received public comment regarding each of these petitions. See Hyperion Requests

and Order in the Competitive Carrier proceeding, Hyperion contends that tariffing is not necessary to ensure that access rates of CAPs are reasonable: "Competitive market forces, together with [the Commission's] power to intervene in appropriate cases, are sufficient checks on the pricing of resale services."[33] Similarly, Time Warner notes that the Commission has recognized that firms without market power cannot rationally provide services at rates that are unjust and unreasonable.[34] Time Warner also argues that experience demonstrates that tariffs are not necessary to ensure just and reasonable rates. As evidence of this, Time Warner maintains that, during the sixteen years since the Commission streamlined requirements for nondominant carriers, "there have been very few -- if any -- meritorious complaints prosecuted at the Commission against the charges, practices or classifications of non-dominant carriers' services, and only one nondominant carrier tariff filing ever has been rejected by the Commission."[35]

11. In its petition, Hyperion further contends that tariffing is not necessary to protect consumers because access providers' primary customers are businesses and IXCs who are sophisticated enough to protect themselves from carriers attempting to charge unreasonable rates for services, and that the availability of competitive alternatives will protect them from any threat of harm caused by the rates and practices of a non-dominant carrier.[36] Time Warner cites the Commission's previous statements with respect to nondominant carriers to demonstrate that tariffs are not necessary for the protection of consumers.[37] Time Warner states that, in the IXC Forbearance NPRM, the Commission noted that mandatory tariff filing requirements undermine the interests of consumers by impeding the development of vigorous

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Forbearance from Tariff Filing Requirements for Competitive Access Providers, Public Notice, DA 96-462 (Mar. 29, 1996) (March Notice); Time Warner Requests Forbearance From Tariff Filing Requirements for Competitive Access Providers, Public Notice, DA 96-902 (June 5, 1996) (June Notice). The names of parties who submitted comments and replies are listed in the attached Appendix.

[33] Hyperion Petition at 5 (quoting Second Report and Order, 91 FCC 2d at 71).

[34] Time Warner Petition at 4 (citing Competitive Carrier First Report and Order, 85 FCC 2d at 31).

[35] Time Warner Petition at 5; see also UTC Comments (June Notice) at 4. The Common Carrier Bureau, affirmed by the Commission, rejected a Capital Network Systems, Inc. (CNS) tariff to introduce Interstate Common Carrier Transfer Service (IXC Transfer Service) by which CNS would transfer calls from the originating location to the local exchange carrier whenever the end user attempted to charge an interstate call to a calling card that CNS could not validate. In the Matter of Capital Network Systems, Inc. Tariff F.C.C. No. 2, Memorandum Opinion and Order, 7 FCC Rcd 8092 (1992). Pursuant to the tariff, CNS would then charge the IXC as a customer for IXC Transfer Service that it did not order and ultimately may not receive. Although unopposed, the Common Carrier Bureau concluded that the tariff was patently unlawful because it was vague and ambiguous in violation of Part 61 of the Commission's Rules, and was an unreasonable practice under Section 201(b) of the Act. The Commission rejected CNS's subsequent application for review.

[36] Hyperion Petition at 5.

[37] Time Warner Petition at 5-7.

competition.[38] Moreover, Time Warner notes the Commission's finding that mandatory tariffing requirements imposed on nondominant carriers can have adverse consequences, including: "1) interference with carriers' ability to make rapid, efficient responses to changes in demand and cost; 2) impeding and removing incentives for competitive price discounting; and 3) imposing costs on carriers to make new offerings."[39] Time Warner also contends that its ability to offer innovative services and pricing options is impeded by the requirement to provide advance public notice of such changes in a tariff.[40]

12. Hyperion argues that forbearance is consistent with the public interest because it will promote competition by permitting exchange access providers to respond to changing demand without being burdened by regulatory delays.[41] Time Warner maintains that forbearance is consistent with the public interest because such a policy would promote competition by precluding opportunities for price coordination among nondominant carriers, and, therefore, it would require these carriers to offer competitive pricing to induce customers to purchase their services.[42] Moreover, Time Warner states that forbearance will enable nondominant carriers to respond to changes in the market quickly and reduce administrative burdens on carriers making new offerings.[43]

B. Comments.

13. Nearly all commenters support the Hyperion and Time Warner petitions. Like the petitioners, commenters cite to past determinations by the Commission that enforcement of tariff filing requirements with respect to carriers lacking market power is unnecessary to ensure reasonable rates or to protect ratepayers because such firms do not have the ability to engage in monopoly or anticompetitive pricing.[44] Several commenters maintain that the

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[38] Time Warner Petition at 5-6 (citing Policy and Rules Concerning the Interstate, Interexchange Marketplace (CC Docket No. 96-61) (Notice of Proposed Rulemaking), FCC 96-123, rel. March 25, 1996, at ¶ 29) (IXC Forbearance NPRM).

[39] Time Warner Petition at 6 (citing Policy and Rules Concerning Competitive Common Carrier Services and Facilities Authorizations Therefor (Sixth Report and Order), 99 FCC 2d 1020 (1985) at 1030).

[40] Time Warner Petition at 6.

[41] Hyperion Petition at 6 (quoting Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, Separate Statement of Commissioner Chong (rel. March 21, 1996)).

[42] Time Warner Petition at 7-8; see also UTC Comments (June Notice) at 5-6.

[43] Time Warner Petition at 7-8.

[44] See, e.g., ALTS Comments (March Notice) at 2; see also Teleport Comments (March Notice) at 3-4; GST Comments (March Notice) at 2-3; Fibersouth Comments (March Notice) at 3; UTC Comments (March Notice) at 3; WinStar Comments (March Notice) at 3; Hyperion Reply Comments (March Notice) at 2-3; Irwin, Campbell and Tannenwald, P.C. Comments on Behalf of Competitive Local Exchange Carriers (Irwin, Campbell Comments) (June

Commission's determinations are applicable to the exchange access market citing evidence that CAPs have no market power in any geographic market.[45] CAPs argue that without market power, they must offer exchange access services at prices that are competitive with those offered by the incumbent.[46] Commenters supporting Time Warner's petition similarly state that, "[b]y definition, nondominant carriers lack market power; they are thus unlikely to behave anti-competitively because such behavior would result in a loss of customers."[47]

14. WorldCom, Inc. (WorldCom) alleges that competitive access providers possess market power in the context of switched access.[48] WorldCom states that where an end user chooses a CAP to be its exchange service provider, an interexchange carrier (IXC) seeking to originate a call from, or terminate a call to, that end user will have no choice but to buy switched access from the end user's CAP, and if that provider charges a discriminatory price, the IXC has no choice but to pay that price in order to complete the call. The IXC cannot choose the incumbent local exchange carrier (ILEC) because the ILEC does not control the loop associated with that end user.[49]

15. Some commenters agree with Hyperion's contention that tariffs do not serve a role in protecting consumers of CAPs' services because the sophisticated consumers of these services can protect themselves from unreasonable prices.[50] Several commenters supporting Time Warner's petition agree with that petitioner's argument that the availability of competitive choices in the market ensures that consumers are not required to obtain services at

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Notice) at 3.

[45] ALTS Comments (March Notice) at 3 (citing CC Dkt 96-98, Notice of Proposed Rulemaking at para. 6 and note 13 for Commission finding that competitive access provider revenues represent a de minimis portion of the market). See GST Comments (March Notice) at 3-5 for a full discussion of the use of tariff requirements to prevent pricing abuses by entities with market power; see also Fibersouth Comments (March Notice) at 3-4; WinStar Comments (March Notice) at 3. Hyperion notes that the Commission has defined "market power" as the "ability to control prices." Hyperion Reply Comments (March Notice) at 3, n. 5 (stating that ILECs control nearly 99.7% of the local access market and quoting Commission observation that CAPs "represent a *de minimis* portion of the market").

[46] MFS Comments (March Notice) at 3; TCG Comments (March Notice) at 7; GST Comments (March Notice) at 6; Fibersouth Comments (March Notice) at 4; UTC Comments (March Notice) at 3.

[47] UTC Comments (June Notice) at 4; see also Irwin, Campbell Comments (June Notice) at 3.

[48] WorldCom Reply Comments (March Notice) at 2.

[49] Id. at 3-5.

[50] MFS Comments (March Notice) at 3; Fibersouth Comments (March Notice) at 4; UTC Comments (March Notice) at 3; WinStar Comments (March Comments) at 2-3; Hyperion Reply Comments (March Notice) at 4.

unreasonable rates.[51] AT&T, a consumer of exchange access services, supports the petitions because it believes that "a permissive detariffing policy for nondominant carriers furthers the pro-competitive, deregulatory purposes of the Telecommunications Act of 1996, and affords nondominant carriers and their customers the maximum flexibility to determine the optimal form for their service arrangements."[52]

16. Certain commenters argue that the Commission should adopt permissive, as opposed to complete, detariffing because tariffs can serve the public interest.[53] For example, some commenters maintain that tariff filings can help access providers reduce transaction costs and that this savings may be passed on to the consumer by obviating the need for individual contracts where a particular service or certain terms and conditions may be standardized.[54] This, some commenters argue, will permit carriers to take advantage of the most efficient mix of tariff and contracting methods with each of their customers. Rather than contracting individually with each customer, CAPs can provide certain services via tariff.[55] Several commenters state that this method provides flexibility to react to changes in the market and initiate new products and services without having to renegotiate every contract.[56] Therefore, providers would face fewer administrative restrictions and be able to respond to market conditions more rapidly, and competitors could market their services without regulatory burdens.[57] Moreover, some commenters note, tariffs can provide concise information about carrier rates and terms to the public, enabling customers to make informed choices after comparing products and services.[58] These commenters contend that the public availability of this information also promotes market entry.[59]

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[51] Irwin, Campbell Comments (June Notice) at 3; UTC Comments (June Notice) at 4; Cablevision Lightpath, Inc. Comments (June Notice) at 2.

[52] AT&T Comments (March Notice) at 1-2, (June Notice) at 1-2.

[53] MFS Comments (March Notice) at 4-5; UTC Comments (June Notice) at 6.

[54] MFS Comments (March Notice) at 4; Fibersouth Comments (March Notice) at 6; Hyperion Reply Comments (March Notice) at 6.

[55] MFS Comments (March Notice) at 5; TCG Comments (March Notice) at 7; GST Comments (March Notice) at 7; Fibersouth Comments (March Notice) at 6-7; WinStar Comments (March Notice) at 2-4. See also AT&T Comments (March Notice) at 1-2, (June Notice) at 1-2.

[56] MFS Comments (March Notice) at 5; Fibersouth Comments (March Notice) at 6-7; WinStar Comments (March Notice) at 3-4.

[57] Irwin, Campbell Comments (June Notice) at 3-4.

[58] MFS Comments (March Notice) at 4; TCG Comments (March Notice) at 7; Fibersouth Comments (March Notice) at 6.

[59] MFS Comments at 4-5 (March Notice).

17. Access providers also argue that permissive detariffing will reduce administrative burdens where they elect to forego tariff requirements, and that consumers will benefit from lower prices for service where the carriers can eliminate the cost of filing tariffs.[60] Additionally, many commenters argue that the Commission will benefit from the reduction in tariff filings by the corresponding reduction in demand on its resources.[61]

18. Several commenters argue that the Commission does not have the statutory authority to prohibit tariff filings.[62] Others argue that complete detariffing is not in the public interest.[63] GST alleges that the Commission's concerns with respect to permissive detariffing of interexchange carriers are not applicable to access providers. GST argues that, unlike the interexchange market where the Commission has adopted a policy of complete detariffing, there is no need for concern that publication of tariffs would facilitate collusive behavior in the access market because most competitive providers have few customers so any actions that would alienate a provider's customers could have a substantial impact on its business.[64]

19. TRA expresses concern that detariffing, whether permissive or mandatory, would "negate the Commission's firmly established pro-competitive resale policies, rendering the Commission's current 'general availability' and nondiscrimination requirements virtually unenforceable."[65] TRA also states that the uncertainty about whether tariffs filed on a voluntary basis would possess the same "full force of law" presently accorded compelled tariff filings could create a burden for carriers requiring renegotiation of extensive long-term contracts. Time Warner disagrees with this contention noting that the Commission maintained a policy of tariff forbearance from 1982 through 1993 without compromising its policy in

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[60] MFS Comments (March Notice) at 6; ALTS Comments (March Notice) at 3; TCG Comments (March Notice) at 7; UTC Comments (March Notice) at 3-4; WinStar Comments (March Notice) at 4; Hyperion Reply Comments (March Notice) at 5.

[61] MFS Comments (March Notice) at 6; ALTS Comments (March Notice) at 4; Fibersouth Comments (March Notice) at 7-8; WinStar Comments (March Notice) at 4; Hyperion Reply Comments (March Notice) at 5.

[62] MFS Comments (March Notice) at 6; TCG Comments (March Notice) at 4-5; WinStar Comments (March Notice) at 2.

[63] MFS Comments (March Notice) at 7 (tariffs remain important to protecting the public interest because many individual customer service contracts rely on tariff language and without tariffs, the introduction of new services and price changes would need to be renegotiated with each customer); Fibersouth Comments (March Notice) at 5-6 (complete detariffing would "complicate contractual obligations for carriers and frustrate consumer efforts to gather information regarding service offerings and rates"); TCG Comments (March Notice) at 5-6 (complete detariffing policy would be challenged in the courts creating years of uncertainty that would hamper CAPs' ability to compete for customers with ILECs); see also WinStar Comments (March Notice) at 2, 4.

[64] GST Comments (March Notice) at 8-9.

[65] TRA Comments at 4.

favor of the unlimited resale of interstate services.[66] Moreover, Time Warner states that, by including provisions regarding both resale and forbearance in the Telecommunications Act of 1996, Congress expressed its judgment that resale and tariff forbearance could coexist.[67]

20. Cincinnati Bell Telephone Company (CBT) states that the Commission "must not grant Time Warner's petition for forbearance unless it also forbears from applying those same regulatory requirements to small and mid-size LECs such as CBT."[68] CBT asserts that Time Warner is a "huge, nationally-recognized corporation with far greater market power than CBT."[69] CBT argues that "preferential regulatory treatment" would allow Time Warner to use LEC tariffs as a price umbrella, and Time Warner could delay new service offerings by LECs by filing petitions to suspend these tariffs ultimately chilling new service development by LECs.[70]

IV. DISCUSSION

21. Time Warner requests forbearance from "tariff filing requirements on non-dominant telecommunications carriers in general, and on non-dominant providers of interstate access services in particular." Neither Time Warner's petition nor the comments identify the many carriers and services that could be covered by this request. Nor do Time Warner or commenters in favor of its petition attempt to justify with any particularity forbearance under the relevant statutory standards. While we are required under Section 10 to grant petitions for forbearance when we are able to make the requisite statutory findings, petitioners must support such requests with more than broad, unsupported allegations in order for us to exercise that statutory authority. Accordingly, we conclude that the record in this proceeding is insufficient to make the required findings under Section 10 for forbearance with respect to Time Warner's general request that we forbear from application of tariff filing requirements for non-dominant telecommunications carriers "in general." We address below, however, Time Warner's and Hyperion's more particular requests that we forbear from application of tariff filing requirements for the provision of interstate access services by providers of interstate exchange access services other than the ILEC.

22. In the IXC Forbearance Order, we determined that complete detariffing of interstate interexchange services better serves the public interest than permissive detariffing. In this case, however, the petitions do not request complete detariffing and we have not issued

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[66] Time Warner Reply Comments at 5-6.

[67] Id. at 6.

[68] CBT Comments (June Notice) at 2-3.

[69] Id. at 1-2.

[70] Id. at 2.

a notice of proposed rulemaking to adopt rules that would require complete detariffing for interstate exchange access services provided by non-ILECs. We continue to believe, as set forth in the IXC Forbearance Order, that complete detariffing generally better serves the public interest than permissive detariffing. Since notice was not given of a proposed change to complete detariffing, however, that option is not currently available to the Commission. Accordingly, we confine our analysis under the statutory standards of forbearance to consideration of the regulatory options available in this proceeding -- continuation of mandatory tariffing for the subject services or grant of the request for permissive detariffing of such services. We defer a final analysis of the comparative benefits of permissive and complete detariffing in this context to the notice of proposed rulemaking proceeding that we initiate below.

23. Under the first criterion for forbearance under Section 10, we must determine whether mandatory tariff filing requirements for non-ILEC providers of interstate exchange access services are unnecessary to assure that rates for interstate access services provided by these carriers are just and reasonable and not unjustly or unreasonably discriminatory. As previously determined by the Commission in the Competitive Carrier Proceeding and the IXC Forbearance Order, tariffing is not necessary to assure reasonable rates for carriers that lack market power. And, as described above, we have previously determined that CAPs are nondominant, and that nondominant carriers, "by definition," cannot exercise market power.[71] We recently reaffirmed this determination in the Access Reform Order where we found that CLECs have not charged unreasonable terminating access rates and are not likely to do so in the future. We determined that competitive LECs do not appear to possess market power and that the imposition of regulatory requirements with respect to competitive LEC terminating access is unnecessary.[72]

24. Further, the record in this proceeding does not demonstrate that non-ILEC providers of interstate exchange access services possess market power.[73] Although we agree with WorldCom's assertion that an IXC terminating a call to a given end user has no choice but to use the access provider designated by that end user, we do not believe that this is a sufficient basis for maintaining mandatory tariff filing because, as explained below, marketplace forces will preclude non-ILECs from charging unreasonable rates for interstate

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[71] See, supra., para. 4. Our policy since the Competitive Carrier Proceeding has consistently been that a carrier is nondominant unless the Commission makes or has made a finding that it is dominant. See Access Reform Order, ¶ 358; 47 C.F.R. § 61.3 (u) (defining nondominant carrier as "[a] carrier not found to be dominant"). This policy is generally appropriate for application to new market entrants that can be expected to enter a market with little or no market share, as is the case with CAPs and CLECs. Treating new entrants as dominant until we find otherwise would impose unnecessary regulation and potentially hinder competition.

[72] See Access Reform Order at ¶ 363.

[73] Similarly, CBT's allegations in this proceeding that Time Warner possesses greater market power than CBT is unsupported.

exchange access. As pointed out by petitioners, they will be competing with ILECs whose rates are subject to regulation, and will, to some extent, constrain non-ILEC prices. And, the record shows that non-ILECs have an extremely small share of the interstate access market.[74] As we explained in the Access Reform Order, as non-ILECs attempt to expand this market share, the rates of their competitors, including incumbent LECs, will constrain the access rates they can charge, and non-ILECs are not likely to risk damaging their relationships with IXCs by charging unreasonable rates.[75] Moreover, the possibility of competitive responses by IXCs to unreasonable access charges such as forming competitive marketing alliances with other exchange access providers, will also constrain the rates charged by non-incumbent LECs.[76] These factors and our findings in the Access Reform Order warrant a finding that non-ILEC providers do not possess market power in the provision of interstate exchange access services that would require tariffing to assure reasonable rates.

25. In addition, if access providers' service offerings violate Section 201 or Section 202 of the Communications Act, we can address any issue of unlawful rates through the exercise of our authority to investigate and adjudicate complaints under Section 208.[77] As we stated in the Access Reform Order, "reliance on the complaint process will be sufficient to assure that non-incumbent LEC rates are reasonable."[78] We will not hesitate to use our authority under Section 208 to take corrective action where appropriate.[79] We therefore conclude that the petitions meet the first of the statutory forbearance criteria with respect to non-ILEC providers of interstate exchange access services.

26. Under the second statutory criterion for forbearance, we must determine whether tariffing of the charges of non-ILEC providers of interstate exchange access services is necessary to protect consumers. As explained above, tariffing is not necessary to assure that rates are just and reasonable. Therefore, tariffing of non-ILEC rates is also not necessary

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[74] ALTS Comments (March Notice) at 3 (citing CC Dkt 96-98, Notice of Proposed Rulemaking at para. 6 and note 13 for Commission finding that competitive access provider revenues represent a de minimis portion of the market); see also Hyperion Reply Comments (March Notice) at 3, n. 5 (stating that ILECs control nearly 99.7% of the local access market and quoting Commission observation that CAPs "represent a de minimis portion of the market"); GST (March Notice) Comments at 5 ("Nationally, competitive access providers capture only about one percent of the access market") (quoting Economics and Technology, Inc. and Hatfield and Associated, Inc., The Enduring Local Bottleneck, pp.2-3 (1995)); Fibersouth Comments (March Notice) at p.4.

[75] Access Reform Order at ¶ 361.

[76] Access Reform Order at ¶¶ 361-362.

[77] 47 U.S.C. § 208.

[78] Access Reform Order at ¶ 363.

[79] *See* Access Reform Order at ¶ 363.

to protect their customers. Accordingly, the petitions meet the second of the statutory forbearance criteria.

27. Under the third criterion for forbearance, we must determine whether permissive detariffing of interstate access services provided by non-ILECs is consistent with the public interest. In contrast to mandatory tariffing, permissive detariffing reduces transaction costs for service providers and reduces the administrative burden on service providers and the Commission. Thus, carriers that choose not to file tariffs will not need to undertake the time and expense of preparing and filing tariffs. And, the Commission would not incur the administrative burden of reviewing them. Section 10(b) requires the Commission, in determining whether forbearance from enforcing a provision of the Communications Act or a regulation is in the public interest, to consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. In this connection, permissive detariffing will avoid any impediments that mandatory tariffing might impose on a carrier's ability to introduce services because of the time and expense of preparing and filing tariffs. Thus, detariffing should lower the cost of market entry of new service providers. Further, permissive detariffing would facilitate market entry of new non-ILEC providers of interstate exchange access services by not requiring that they disclose their prices to competitors. In this way, new entrants can market services without publicly disclosing their rates to competitors. Accordingly, we conclude that permissive detariffing, in contrast to mandatory tariffing, would serve the public interest by reducing administrative burdens on carriers and the Commission, promoting competitive market conditions, facilitating provision of new service offerings, and promoting market entry. Thus, permissive detariffing will also further the goal of the 1996 Act to "promote competition and reduce regulation . . . to secure lower prices and higher quality service for American telecommunication consumers and encourage the rapid development of new telecommunications technologies."[80] Permissive detariffing will help achieve these goals by eliminating unnecessary regulation, reducing costs on carriers, and facilitating market entry.

28. We are not persuaded by TRA's argument that elimination of tariff filing requirements would be contrary to the public interest because it would negate the Commission's pro-competitive resale policies, render the nondiscrimination requirements unenforceable, or create an "enormous administrative burden" for carriers because of uncertainty regarding whether tariffs filed on a voluntary basis will possess the "full force of law."[81] Other than generalized allegations, TRA has failed to explain how permissive detariffing would create these circumstances. Simply stated, our resale policies will continue in effect. Further, nondiscrimination requirements can be fully enforced through the Section

[80] Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement).

[81] TRA Comments (March Notice) at 4.

208 complaint process. TRA's allegations of burdens on resellers is completely unsupported. We note that the Commission forbore from application of tariff filing requirements from 1982 through 1993. We are not aware of any credible evidence demonstrating that this policy adversely affected our resale policies or imposed significant burdens on resellers.[82] Accordingly, based on the record in this proceeding and our experience with permissive detariffing, we do not believe that permissive detariffing of interstate access services provided by non-ILECs will harm resellers.

29. In view of the foregoing, we conclude that the statutory criteria for forbearance have been met with respect to those non-ILEC providers of interstate exchange access services. We will therefore grant the petitions with respect to those carriers.

30. Our discussion in the IXC Forbearance Order of the factors that led us to adopt complete detariffing of domestic, interstate interexchange services is not inconsistent with our finding in this case that permissive detariffing of non-ILECs better serves the public interest than requiring them to continue to file tariffs for these services. In the IXC Forbearance Order, we expressed concern with permissive detariffing only in contrast with complete detariffing. We determined that permissive detariffing for interexchange services was not preferable to complete detariffing. For example, in the IXC Forbearance Order, we concluded that permissive detariffing would not serve the public interest, in contrast to complete detariffing, because it may continue to afford carriers the protection of the filed rate doctrine. In this case, by contrast, the only other option available to us -- current mandatory tariffing -- would assure that non-ILEC providers of interstate exchange access services would continue to be able to take advantage of the filed rate doctrine. Thus, as discussed by the Commission in the IXC Forbearance Order and as we discuss in the NPRM below, our concerns about the effects of the filed rate doctrine remain a very significant public interest concern in a case where we find that complete detariffing is an option. But, these concerns are not as significant where we are evaluating the comparative benefits of mandatory tariffing versus permissive detariffing. While questions about the role of the filed rate doctrine in a permissive detariffing regime may lead to uncertainty, we find any adverse effects attributable to such uncertainty are outweighed by the public interest benefits of permissive detariffing discussed above. We note that the IXC Forbearance Order has been stayed by the United States Court of Appeals for the District of Columbia Circuit.[83] Although the court did not state the basis for the stay, the primary argument raised by the petitioners in that matter was a challenge to the authority of the Commission to adopt complete detariffing. These arguments are not applicable to the present Order because the option of adopting complete detariffing is not currently available to the Commission.[84] Moreover, the court's concerns about irreparable

[82] Permissive detariffing was in effect during this period, except during the period of time in 1985 when mandatory detariffing was established.

[83] MCI Telecommunications Corp. v. FCC, No. 96-1459 (D.C. Cir. Feb. 13, 1997).

[84] See ¶ 22, supra.

harm in MCI Telecommunications Corp. v. FCC are not relevant here because parties have the option to file tariffs pending further consideration of complete detariiffing in our NPRM. In any event, non-ILECs, as explained, will remain subject to all remedies under section 208.

31. Similarly, with respect to the other concerns about permissive detariffing expressed in the IXC Forbearance Order, we were comparing permissive versus complete detariffing. Thus, as explained in the IXC Forbearance Order, carriers would be unable to use the tariff process to engage in price signalling under complete detariffing. However, we cannot eliminate price signalling under either mandatory tariffing or permissive detariffing since carriers have equal opportunity to engage in price signalling in an environment of mandatory tariffing or permissive detariffing. Therefore, the opportunity for price signalling by carriers subject to permissive detariffing does not dissuade us from granting the petitions. And, although administrative burdens on the Commission will decrease most significantly under complete detariffing which would presumably eliminate any burdens associated with administering a tariff filing program, permissive detariffing will nevertheless reduce the administrative burden on the Commission, as compared to mandatory tariffing, because fewer tariffs are likely to be filed.

32. In the IXC Forbearance Order, we stated that it seems inconceivable that Congress intended Section 10 to be interpreted in a manner that allowed continued compliance with provisions or regulations that the Commission has determined were no longer necessary in certain contexts. Under Section 10, we must forbear from applying a regulatory requirement if the statutory criteria are met. We do not believe that Congress intended in Section 10 to foreclose achieving the public interest benefits of permissive detariffing where, as here, we find that the statutory criteria for forbearance have been met simply because complete detariffing may better serve the public interest. Accordingly, we do not believe that, in the context of the present petitions, permissive detariffing conflicts in any regard with Section 10 or the IXC Forbearance Order.

V. NOTICE OF PROPOSED RULEMAKING

33. As discussed above, we grant the petitions before us to establish permissive detariffing for non-ILEC providers of interstate exchange access services. In this NPRM, we propose to establish complete, i.e., mandatory detariffing for these non-ILEC providers of interstate exchange access services.

34. We tentatively conclude that complete detariffing for non-ILECs would provide the benefits that we have identified for permissive detariffing: reduction of transaction costs for providers; reduction of administrative burdens for service providers; permitting rapid response to market conditions through elimination of costs on carriers that attempt to make new offerings; and, facilitating entry by new providers. We also tentatively conclude that complete detariffing for those carriers could offer additional public interest benefits beyond those of permissive detariffing. Complete detariffing could preclude carriers from attempting to use the filed rate doctrine to nullify contractual arrangements, and remove uncertainty about the application of the doctrine to tariffed arrangements that are filed on a permissive basis. Complete detariffing could also eliminate any threat of price coordination through tariffing. Complete detariffing could also reduce the administrative burden on the Commission of maintaining the tariff filing program. Although permissive detariffing would cause some reduction in the resources expended for tariff filing, complete detariffing would eliminate administration of all but ILECs' tariffs. We seek comment on these tentative conclusions and any other potential benefits to be derived from a policy of complete detariffing. We also solicit comment on whether we should require any non-ILEC providers of interstate exchange access services subject to any degree of tariff forbearance to make rates available to the Commission and to interested persons upon request.[85]

VII. PROCEDURAL ISSUES

A. *Ex Parte* Presentations

35. This is a non-restricted notice-and-comment rulemaking proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's Rules.[86]

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[85] In the IXC Forbearance Order, the Commission required interexchange carriers to make available to the public sufficient information to determine whether a carrier is adhering to the geographic rate averaging and rate integration requirements of Section 254(g). See IXC Forbearance Order, ¶ 84. Ad Hoc Users Committee, supported by several commenters including API, Bell Atlantic and Sprint, has requested that the Commission on reconsideration rescind this requirement. See Petition for Clarification and Partial Reconsideration of the Ad HocTelecommunications Users Committee, The California Bankers Clearing House Association, The New York Clearing House Associatioin, ABB Business Services, Inc., and The Prudential Insurance Company of America, CC Docket No. 96-61.

[86] See generally 47 C.F.R. ¶¶ 1.1202, 1.1203, 1.1206.

B. Initial Paperwork Reduction Analysis

36. This *Notice of Proposed Rulemaking* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Notice of Proposed Rulemaking*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Notice of Proposed Rulemaking*; OMB comments are due 60 days from the date of the publication of this *Notice of Proposed Rulemaking* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

C. Initial Regulatory Flexibility Analysis

37. As required by the Regulatory Flexibility Act,[87] the Commission has prepared the following Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (NPRM) to establish complete detariffing of non-ILEC providers of interstate exchange access services. Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on Complete Detariffing for Non-Incumbent LECs provided in Section VII(D). The Commission shall send a copy of this NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA) in accordance with the RFA, 5 U.S.C § 603(a).[88]

38. Need for and Objectives of the Proposed Rule: The Commission, in compliance with Section 10(a) of the Telecommunications Act of 1996, proposes to adopt complete detariffing for non-ILEC providers of interstate exchange access services.[89] Section 10 of the Communications Act of 1934, as amended (Communications Act), requires the Commission to forbear from tariff filing requirement if statutory criteria are met. We anticipate that the proposed rule will: reduce transaction costs and administrative burdens for

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[87] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, was amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[88] 5 U.S.C. § 603 (a).

[89] The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

providers, permit providers to make rapid responses to market conditions, and facilitate entry by new providers.[90]

39. Legal Basis: As stated above, Section 10 of the Communications Act requires the Commission to forbear from applying a regulation if statutory criteria are met. The Commission has previously determined that complete detariffing is more consistent with the public interest than permissive detariffing in the context of interexchange services. The Commission seeks comment regarding whether this is also true with respect to interstate exchange access services.

40. Description and Estimate of the Number of Small Entities To Which the Proposed Rule Will Apply: Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. § 601(6). The RFA, 5 U.S.C. § 601(3), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632.[91] A small business concern is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the SBA.[92] SBA has defined a small business for Standard Industrial Classification (SIC) category 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have no more than 1500 employees.[93]

41. *Total Number of Telephone Companies Affected.* The proposals in this NPRM would have an impact on a substantial number of small telephone companies identified by SBA. The United States Bureau of the Census ("the Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone service, as defined therein, for at least one year.[94] This number contains a variety of different category of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497

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[90] See, supra. para. 31.

[91] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). The statutory definition applies unless the Commission has developed an alternative definition more appropriate for its activities. *Id.*

[92] 15 U.S.C. § 632.

[93] 13 C.F.R. § 121.201.

[94] United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

telephone service firms may not qualify as small entities or small incumbent LECs because they are not independently owned and operated.[95]

42. *Local Exchange Carriers.* Neither this agency nor SBA has developed a definition of small providers of local exchange service (LECs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[96] The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with Telecommunications Relay Service (TRS). According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange service.[97] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. We conclude that there are fewer than 1,347 small incumbent LECs that may be affected by the proposals in this Report and Order.

43. *Competitive Access Providers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 30 companies reported that they were engaged in the provision of competitive access services.[98] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 30 small entity CAPs.

44. *Small Businesses (Workplaces).* Workplaces encompass establishments for profit and nonprofit, plus local, state and federal governmental entities. SBA guidelines to the SBREFA state that about 99.7 percent of all firms are small and have fewer than 500

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[95] 15 U.S.C. § 632(a)(1).

[96] Standard Industrial Classification (SIC) Code 4813.

[97] Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data,* Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Dec. 1996) (*TRS Worksheet*).

[98] Id.

employees and less than $25 million in sales or assets.[99] There are approximately 6.3 million establishments in the SBA database.[100]

45. *Interexchange Carriers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 97 companies reported that they were engaged in the provision of interexchange services.[101] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 97 small entity IXCs that may be affected by the decisions and rules proposed in this NPRM.

46. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements: The rule which the Commission proposes would reduce substantially reporting and recordkeeping because non-ILEC providers of interstate exchange access services would no longer file tariffs with the Commission.

47. Steps Taken to Minimize Any Significant Economic Impact on Small Entities, and Significant Alternatives Considered: The Commission has considered, as alternatives, requiring either mandatory tariffing or permissive detariffing. Each of these options, however, would maintain an economic burden on a substantial number of small entities. We believe that this burden would be detrimental to small carriers because they would need to expend resources to file tariffs, and we have tentatively concluded that such filings are no longer in the public interest.

48. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules. The Commission is proposing to adopt complete detariffing for the provision of exchange access services by non-ILECs. We are aware of no rules that may duplicate, overlap, or conflict with the proposed rules. We seek comment on this conclusion.

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[99] A Guide to the Regulatory Flexibility Act, U.S. Small Business Administration, Washington D.C., May, 1996, at page 14.

[100] Id. at 15.

[101] Id.

D. Comment Filing Procedures

49. Notice of Proposed Rulemaking Filing Dates: Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties shall file comments with the Secretary, Federal Communications Commission, Room 222, Washington, D.C. 20554 no later thirty (30) days from the date of publication of this NPRM in the Federal Register, and reply comments thirty (30) days thereafter. To file formally in this proceeding, participants must file an original and twelve copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus 16 copies must be filed. In addition, parties should file two copies of any such pleading with the Competitive Pricing Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Parties should file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

50. Parties submitting diskettes should submit them along with their formal filings to the Office of the Secretary. Such diskette submissions would be in addition to and not a substitute for the formal filing requirements addressed above. Such submissions should be on a 3.5 inch diskette formatted in an DOS PC compatible form. The document should be saved in to WordPerfect 5.1 for Windows format. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comment), Docket number, and date of submission. The diskette should be accompanied by a cover letter.

51. Written comments by the public on the proposed and/or modified information collections are due no later thirty (30) days after date of publication in the Federal Register, and reply comments thirty (30) days thereafter. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed modifications to information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, D.C. 20503 or via the Internet to fain_t@al.eop.gov.

VIII. ORDERING CLAUSES

52. Accordingly, IT IS ORDERED, pursuant to Section 10 of the Communications Act of 1934, as amended, 47 U.S.C. § 160, that the "petition" filed by Hyperion Telecommunications, Inc. and the "petition" filed by Time Warner Communications ARE GRANTED to the extent discussed above and are otherwise DENIED.

53. IT IS FURTHER ORDERED that, pursuant to Sections 1 through 4, and 10 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151 through 154, and 160, that NOTICE IS HEREBY GIVEN OF the rulemaking described above and that COMMENT IS SOUGHT on these issues.

54. IT IS FURTHER ORDERED that a copy of this FURTHER NOTICE OF PROPOSED RULEMAKING, including the IRFA herein, will be sent to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act, 5 U.S.C. § 603(a).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A
LIST OF PARTIES

List of Commenters in CCB/CPD 96-3

Comments

MFS Communications Co., Inc. (MFS)
Association for Local Telecommunications Services (ALTS)
AT&T Corp. (AT&T)
Telecommunications Resellers Association (TRA)
Southwestern Bell Telephone Company (SWBT)
Teleport Communications Group Inc. (TCG)
GST Telecom, Inc. (GST)
Fibersouth, Inc. (Fibersouth)
UTC, The Telecommunications Association (UTC)
MCI Telecommunications Corporation (MCI)
WinStar Communications, Inc. (WinStar)

Reply Comments

WorldCom, Inc. (WorldCom)
Bell Atlantic
Hyperion

List of Commenters in CCB/CPD 96-7

Comments

Cablevision Lightpath, Inc. (Cablevision Lightpath)
AT&T
SWBT
Cincinnati Bell Telephone Company (CBT)
ALTS
TRA
National Cable Television Association (NCTA)
UTC
Irwin, Campbell and Tannenwald, P.C., on behalf of three CLECs

Reply Comments

Time Warner